



Appeal of Avco Financial Services, Inc.

Appellant, a consumer finance company, files its returns on the basis of a fiscal year ending November 30. For the income year ended November 30, 1976, appellant requested and received an extension of time in which to file its franchise tax return. The request for an extension was accompanied by a payment of \$97,710, which brought appellant's credits for the year to \$737,000, its estimated tax liability. The **return** was ultimately **filed** on August 15, 1977, which was within the **extension** period. The return, which reflected a liability of \$889,229, was accompanied by a payment of \$152,229.

On December 23, 1977, respondent issued a notice of action reflecting a refund due appellant as the result of a change in the bank tax rate. At the same time a \$1,000 penalty for the late payment of the tax was also assessed.

Appellant challenges the imposition of the penalty, arguing that the difficulty of estimating the tax due on its worldwide income constituted reasonable cause for the underpayment. Appellant contends that the payment of 8 1/4 percent of the adjusted liability by the due date supports its position that the underpayment was not the result of willful neglect.

Section 25934.2 of the Revenue and Taxation Code provides, in pertinent part:

(a) If any taxpayer fails to pay the amount of tax required to be paid under Sections 25551 and 25553 by the date prescribed therein, then unless it is shown that the failure was due to reasonable cause and not willful neglect, a penalty of 5 percent of the total tax unpaid as of the date prescribed in Sections 25551 and 25553 shall be due and payable upon notice and demand from the Franchise Tax Board.
. . . In no case, however, may the penalty imposed under this section be less than five dollars (\$5) or more than one thousand dollars (\$1,000).

Section 25551 of the Revenue and Taxation Code, which **is** applicable to appellant, provides:

Except as otherwise provided in this chapter, the tax imposed by this part shall be paid not later than the time fixed for filing the return (determined without regard to any extension of time for filing the return). (Emphasis added.)

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The normal due date for filing appellant's return for the income year ended November 30, 1976, was February 15, 1977. (Rev. & Tax. Code, § 25401, subd. (a).) Since appellant failed to pay \$152,229 of its total franchise tax liability for that year until August 15, 1977, respondent's imposition of the penalty for late payment of tax was proper, unless such untimely payment was due to reasonable cause and not due to willful neglect. Appellant bears the burden of proving that both of those conditions existed. (Rogers Hornsby, 26 B.T.A. 591 (1932); see Appeal of Telonic Altair, Inc., Cal. St. Bd. of Equal., May 4, 1978.) In order to establish reasonable cause, the taxpayer must show that its failure to act occurred despite the exercise of ordinary business care and prudence. (See Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955), cert. den. 350 U.S. 967 [100 L. Ed. 839] (1956); Appeal of Citicorp Leasing, Inc., Cal. St. Bd. of Equal., Jan. 6, 1976.)

The imposition of this penalty has been upheld recently in Appeal of Cerwin-Vega International, decided August 15, 1978, where the taxpayer, a domestic international sales corporation, was unable, because of federal law, to resolve certain accounting problems until six months after the close of its first fiscal year. In holding that the penalty was properly assessed we concluded that these difficulties did not constitute reasonable cause for failure to comply with the applicable law. We conclude that appellant presents no more compelling evidence of reasonable cause sufficient to excuse the late payment penalty than did the taxpayer in Cerwin-Vega. That appellant had difficulty in determining its income with exactitude does not negate the requirement that it make timely payment based upon a reasonably accurate estimate of its tax liability. A 16 percent underpayment is not reasonably accurate. 1/

Accordingly, we conclude that respondent's action in this matter must be sustained.

1/ New regulations intended to mitigate the potential hardship of this penalty recognize the difficulty of accurately estimating tax liability by the due date, but require that at least 90 percent of the tax liability be paid by the due date. (Cal. Admin. Code, tit. 18, reg. 25934.2 (effective June 5, 1978).)

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Avco Financial Services, Inc. for refund of a penalty for late payment of tax in the amount of \$1,000.00 for the income year ended November '30, 1976, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of May, 1979, by the State Board of Equalization.

Stallingsby Burnett Chairman
John K. [unclear] Member
James J. [unclear] Member
W. P. [unclear] Member
 M e m b e r